

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)
West Publishing Corporation,) File No. 18-cv-1445
) (DSD/ECW)
Plaintiff,)
)
vs.) St. Paul, Minnesota
) October 16, 2019
LegalEase Solutions, LLC,) 10:04 a.m.
)
Defendant.)

BEFORE THE HONORABLE ELIZABETH COWAN WRIGHT
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTION HEARING)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

APPEARANCES

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P R O C E E D I N G S

I N O P E N C O U R T

THE COURT: All right. We are here today in the matter of West Publishing Corporation v. LegalEase Solutions, LLC, Case No. 18-cv-1445 DWF/ECW. And we're here on West's motion to compel production of documents from Ross Intelligence, Inc., pursuant to a subpoena.

If counsel could make their appearances for the record, beginning with counsel for West.

MS. FRIEDEMANN: Good morning, Your Honor. Lora Friedemann for West Publishing Corporation, and with me is Scott Lashway from Manatt, Phelps & Phillips, and Mr. Lashway will present this morning.

THE COURT: All right. Thank you. Good morning to both of you.

MR. LASHWAY: Good morning.

THE COURT: And for LegalEase?

MS. CEFALU: Your Honor, Amanda Cefalu from Kutak Rock here on behalf of LegalEase.

THE COURT: And do you plan on arguing today, Ms. Cefalu? Do you know yet?

MS. CEFALU: I'm agreeing with the company.

THE COURT: Okay. So you will be arguing?

MS. CEFALU: I will be arguing. I will put our position on the record.

1 THE COURT: All right. Thank you.

2 And for ROSS Intelligence?

3 MR. LANCASTER: I'm Peter Lancaster for ROSS
4 Intelligence, and with me is Tomas Van Der Heijden whose
5 name is splashed across the papers.

6 THE COURT: I noticed that. All right. Good
7 morning to both of you. Thank you.

8 All right. Well, this is West's motion, so I will
9 let you proceed, Mr. Lashway.

10 MR. LASHWAY: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. LASHWAY: I'm going to keep my comments
13 relatively brief, and of course invite the Court to ask any
14 questions that I can answer to expedite your consideration
15 of our motion.

16 So, Your Honor, I know this is well-briefed, but
17 there seems to be some disagreement even as to the timeline
18 for why we're here in front of you. As you may recall,
19 we've had discovery challenges as Plaintiffs in this case
20 for some time. We've been in front of you on motions really
21 on an informal basis with LegalEase trying to obtain what we
22 view are core documents. Our theories set forth in the
23 complaint have been borne true. Our theory that LegalEase
24 was extrapolating Westlaw, copyrighted Westlaw, protected
25 data down and then using it to supply it to a company that

1 was seeking to be a competitor of ours has borne fruit. We
2 haven't finished discovery yet, and we think we're permitted
3 to do so so that we can understand the scope of the
4 wrongdoing here and the violation of the subscription
5 agreements that are core to our complaint, in addition to
6 allowing ourselves to appropriately defend ourselves against
7 LegalEase's counterclaim.

8 We have sought discovery from LegalEase. We
9 continue to think that they haven't been forthcoming as they
10 should as a party, but that's not why we're here. Because
11 we're seeking injunctive relief in connection with this
12 case, we have -- we found that we were required to go to
13 ROSS to determine what ROSS received from LegalEase that is
14 protected material, that is material that was obtained in
15 violation of the contract, and to explore how that material
16 was possessed and why ROSS wanted it and what they've done
17 with it.

18 THE COURT: Are you going to ROSS because you have
19 not been able to get LegalEase-produced documents, or are
20 you going to ROSS for this separate reason?

21 MR. LASHWAY: So we're going to ROSS for both
22 reasons, Your Honor; both because we don't think that we've
23 obtained all of the necessary material from LegalEase, but,
24 in addition, and importantly for our motion here, because
25 ROSS is in receipt of information that was obtained in

1 violation of the contract, and we think we have a right to
2 understand how that third party has received that
3 information, what information they received, whether the
4 information they received violates the contract that
5 LegalEase had with us, what they knew about it. And all of
6 this goes to inform the potential scope of injunctive relief
7 that we're seeking, Your Honor.

8 So with that, let me walk you through the
9 chronology briefly. Because they're a third party, we tried
10 to narrowly tailor the scope of our subpoena. We're not
11 trying to understand how ROSS's machine-learning client or
12 artificial intelligence technology works. My client has
13 their own. We don't care how ROSS does theirs. What we are
14 trying to do is get forward what we view as discrete
15 categories of documents.

16 We issued a subpoena on June 14th. ROSS's counsel
17 accepted service on June 20th. Yet, by mid-September, three
18 months later, there still -- it was still clear to us that
19 we hadn't obtained all of the basic material that was called
20 for by the subpoena. Now, counsel for ROSS had issued an
21 objection letter, which we accepted, and we said to them,
22 Rather than go back and forth on a letter-writing campaign
23 that will cost your client a lot of money as well as ours,
24 and rather than seek a motion to compel at that stage --
25 this was now in July, so 30 to 45 days after issuance of the

1 subpoena -- we said, Let's see what you are going to produce
2 and we'll assess it and we'll tell you whether we're
3 satisfied. We thought that that was a very accommodating
4 position given that they're a third party in the case and
5 not an actual party.

6 Well, what proceeded was us having to follow-up
7 with them time and again pointing out that they hadn't even
8 committed -- they hadn't even produced the documents to
9 which they had committed to produce in their objection
10 letter. So in August, we sent a follow-on letter that said,
11 We don't have these materials. You said you were going to
12 give them to us, including the Slack communications.

13 THE COURT: Let me just inform you, I've looked at
14 the briefs really closely and I have read all the
15 correspondence that's attached to it, so I am familiar with
16 the timing, and I know --

17 MR. LASHWAY: Sure.

18 THE COURT: -- that there were several letters and
19 e-mails that went back and forth --

20 MR. LASHWAY: Sure.

21 THE COURT: -- and communications and so on.

22 MR. LASHWAY: So I'm leading up to a very
23 important communication. In response to that, on
24 August 14th, ROSS says to us, Here are the search terms
25 we're going to explore. But what they also said is we are

1 inclined to exclude Westlaw as a search term, quote,
2 unquote, because it contains a very large proportion of
3 false hits. Well, it's not until just prior to filing the
4 motion that we actually get clarity as to what ROSS did or
5 didn't do to collect documents. It's not clear to us how
6 the nine custodians were identified. We're not looking for
7 just communications with LegalEase. Presumably LegalEase
8 should have produced those. We're trying to --

9 THE COURT: When did --

10 MR. LASHWAY: -- understand the internal
11 communications as to the use of the Westlaw data that's
12 been --

13 THE COURT: When did you first let ROSS know you
14 were unhappy with their search terms or with the custodians
15 that were listed in their August 14th letter?

16 MR. LASHWAY: So that was part of our continued
17 conversations. There's another meet and confer on
18 August 20th, I believe --

19 THE COURT: Uh-huh.

20 MR. LASHWAY: -- in which we're continuing to ask
21 them where are the documents.

22 THE COURT: Did you tell them that you were
23 unhappy with the search terms at the time?

24 MR. LASHWAY: No. Our position was if you want to
25 use search terms, so be it. As long as I get the documents,

1 Your Honor, I'm going to be fine with it. But ultimately by
2 September, when we finally get a production and there's
3 representations that that's it, it was clear to us then that
4 the search terms didn't work. Our position, Your Honor, is
5 that we shouldn't have to decide what the search terms
6 should be. My search term list would probably be 100 search
7 terms long. I have no idea if those would be relevant or
8 not for ROSS.

9 THE COURT: Let me put it this way, I understand
10 that, you know, perhaps it's ROSS's burden to first come up
11 with a list of search terms which they provided to you in
12 August, but I think that if you -- if you have additional
13 search terms or concerns about whether they're using
14 variants and so on, I'm struggling to understand with why
15 you didn't let them know that there were additional terms or
16 variants that you thought they should be using, or, if you
17 did, when did that happen and where can I find it in the
18 record?

19 MR. LASHWAY: So, Your Honor, we did not
20 specifically engage in the search terms.

21 THE COURT: Okay.

22 MR. LASHWAY: We did not specifically say, You did
23 not look for the variations project that we've learned about
24 in September through follow-on productions and that we
25 learned about last week as we were continuing to take

1 depositions of LegalEase's witnesses.

2 THE COURT: Okay.

3 MR. LASHWAY: That hadn't been identified by
4 LegalEase. We did not do that. What we told them was,
5 Complete your production, we'll look at it and we'll let you
6 know if it's enough. What we've heard -- sorry. What we
7 have heard --

8 THE COURT: Do you need a minute?

9 MR. LASHWAY: I just had a hair in my mouth. What
10 we have seen in response, though, is now a reliance on,
11 well, we ran search terms that we set -- that we
12 established, without our agreement, which I don't think is
13 proper, and, therefore, you get what you get, and you don't
14 get anything else. And that certainly can't be the case,
15 Your Honor, when we did not agree to their -- to accept
16 their objections to limit the subpoena. We did agree to
17 have patience with respect to their production. And if they
18 had completed their production in August, we would have been
19 there then and said the search terms didn't work. Instead,
20 they completed their production in mid-September, and we
21 told them, your collection and search didn't work, and we
22 want the rest of it. And that's what's lead us to be here.

23 THE COURT: And so have they refused to run
24 additional search terms?

25 MR. LASHWAY: They have not been willing to

1 revisit their collection or their production in our view. I
2 don't think they're entitled, Your Honor, even as a third
3 party, to say, We're going to limit our collection or the
4 way we review the documents, including by search terms, and
5 now it's your problem, the burden shifts to the Plaintiff or
6 the issuing party to say tell us how we got it wrong. I
7 don't think that that's what Rule 45 permits. I think
8 Rule 45 has some limitations around burden, but the issues
9 about burden, which we can address in a minute, aren't
10 relative to the search terms. The search terms are
11 something they propose. We said, Send us your production;
12 and we, to this day, are convinced that we still don't have
13 the documents that are called for by the subpoena, basic
14 documents, Your Honor.

15 THE COURT: Okay.

16 MR. LASHWAY: We're not looking for something
17 expansive here. We just want the core stuff.

18 THE COURT: Sure. I understand. One more
19 question about the search terms. So have you -- to date,
20 have you sent ROSS a list of what terms you would propose,
21 these additional project names, et cetera, et cetera? Has
22 that dialogue taken place? No?

23 MR. LASHWAY: We have not, Your Honor, no.

24 THE COURT: Okay. All right.

25 MR. LASHWAY: We would be happy to engage in that

1 dialogue, but we're not convinced that ROSS actually is
2 willing to produce additional documents, and I think their
3 opposition bears that -- bears that out, so much so that
4 they had agreed to produce the documents that they've
5 produced to date. We said, Great. Produce them. We'll
6 take a look. And now they're turning around and asking for
7 some sort of cost-shifting with respect to the work they've
8 done to date. And so certainly they're not offering to say,
9 Well, we'll revisit our entire production in light of the
10 complaints that you have been making for, you know, two-plus
11 months.

12 THE COURT: I think their introduction says
13 they're not necessarily opposed to producing additional
14 documents. I think the introduction of their brief says
15 that.

16 MR. LASHWAY: And, Your Honor, when we talk about
17 specifics, like where's the Google Sheet, there's a lot of
18 attention paid to the 26,000 memos they produced, which were
19 only produced after we told them, You're missing 27,000
20 documents in Word format that LegalEase provided to you, and
21 counsel wasn't aware of that, which, again, that was the end
22 of August, leads us to believe that the search for documents
23 here has not been fulsome.

24 So, Your Honor, just a couple of more challenges
25 that we've faced in this matter. There are things like a

1 Google Sheet that sit in a Google drive that LegalEase
2 testified to last week they don't have access to. This was
3 the document that was used by ROSS and LegalEase to frame
4 the question that was answered. I'll represent to the
5 Court, in my understanding, my interpretation of the
6 testimony we obtained last week from LegalEase executives
7 was that those questions were being framed using Westlaw
8 headnotes; that they were copied and pasted Westlaw
9 headnotes trying to mimic West's key number system. To me,
10 this is a core document, along with the material that was
11 prepared and sent by LegalEase to ROSS. No one seems to
12 know where the Google Sheets are and no one has produced
13 them to date.

14 THE COURT: And have you discussed that with
15 Mr. Lancaster?

16 MR. LASHWAY: We've asked, Have you searched the
17 Google drive, have you searched Box accounts, are there
18 other materials? They produced the memos in a .json format,
19 which LegalEase tells us last week they have never heard of
20 before. So there seems to be some discrepancy here between
21 two parties that have had some sort of ongoing conversations
22 based on testimony last week, and we're left in the middle
23 as the Plaintiff saying, Can we please just finish document
24 production so we can move along the case to summary
25 judgment.

1 THE COURT: Okay.

2 MR. LASHWAY: Your Honor, I can address maybe just
3 quickly this issue about privilege.

4 THE COURT: I would like you to address that, and
5 then, actually, I'd like you to go through each of the
6 current requests and let me know what you think is still
7 outstanding.

8 MR. LASHWAY: Okay.

9 THE COURT: Okay.

10 MR. LASHWAY: So do you want me to do that first?

11 THE COURT: Sure. That would be great.

12 MR. LASHWAY: And, Your Honor, I think we laid
13 this out in our reply in some detail in terms of what we're
14 looking for here.

15 THE COURT: Uh-huh.

16 MR. LASHWAY: So with Request 1 -- and do you want
17 to just read what they each are?

18 THE COURT: No. I have them here in front of me.

19 MR. LASHWAY: Okay.

20 THE COURT: So I understand Request 1 relates to
21 basically communications with Morae, Clutch, Kelly Services
22 and LegalEase India.

23 MR. LASHWAY: Yeah, and frankly anyone else.

24 THE COURT: Okay.

25 MR. LASHWAY: And, Your Honor, as we set forth in

1 our reply -- and I'm literally just going to be walking you
2 through our reply brief, because that's what we tried to do
3 in our reply is to tell you here's what we think we're
4 missing -- the opposition to that, and our reading of it
5 says that they cannot, with total confidence, provide that
6 all relevant memoranda had been produced. Morae Global,
7 Clutch Group, and Kelly prepared some of the -- what we call
8 answer files, what they call research memoranda, to ROSS.
9 It's unclear yet in the record as to whether Morae, Clutch,
10 or Kelly Services provided those directly to ROSS, but we
11 think they did, and we're going to be taking their
12 depositions, as you may recall. Now, we understand ROSS's
13 position is that we don't have any communications. What's
14 clear from the opposition is that they searched a limited
15 universe, and we would like a larger universe of custodians
16 or other documents to be searched, including what is
17 described as the ROSS portal, some technology web user
18 interface that allowed the provision of the data that was
19 taken from Westlaw to be shared with ROSS electronically
20 without the use of e-mail communications.

21 THE COURT: Has your review of the documents to
22 date or your depositions identified any custodians in
23 addition to the nine that were identified by ROSS?

24 MR. LASHWAY: No, Your Honor. There are
25 references to -- but, again, we don't have the full

1 production, right, so we only have 900 internal e-mails on a
2 project that we think cost over half a million dollars, it
3 went on for two-plus years, that included six statements of
4 work, six different projects. Our understanding is all of
5 them involved the use of Westlaw data. Some of them may
6 have involved the use of Lexis data, which is obviously not
7 a party here.

8 Documents -- this is No. 2, documents and
9 communications concerning LegalEase's provision, either
10 directly or indirectly, of Westlaw information and
11 information derived therefrom to ROSS.

12 THE COURT: Uh-huh.

13 MR. LASHWAY: So we have 27,000-plus memos from
14 LegalEase. We have 26,000 and change from ROSS. What we
15 don't have is any communications as to how those memos were
16 formed -- this is the Google Sheets -- how the questions
17 were posed, and we don't have any internal communications at
18 ROSS discussing how the memos were used. So what were they
19 doing with them? One of our complaints is that LegalEase
20 was providing Westlaw data to a competitor to build
21 competing technology. That's prohibited by the subscription
22 agreement. We think we have the right to explore who knew
23 what about that when.

24 THE COURT: And is it your sense that the
25 development of and the use of these documents provided

1 through the portal or through Google Sheets is going to be
2 described in the Slack communications?

3 MR. LASHWAY: It could be.

4 THE COURT: Because I think what I'm struggling
5 with here is that, you know, I've got a person -- or an
6 entity that's been served with a subpoena. They looked at
7 nine custodians, and it sounds like we don't, right now,
8 have a sense for any other custodians you'd want them to
9 search. And if I assume that they're -- you know, what they
10 have said in their brief is true -- in their affidavits is
11 true, it looks like they have done an investigation. And so
12 what I'm wondering is what are the buckets of documents that
13 you think are missing?

14 MR. LASHWAY: Yeah.

15 THE COURT: So there's the Slack documents?

16 MR. LASHWAY: The Slack communications.

17 THE COURT: There's the Google Sheets?

18 MR. LASHWAY: The Google Sheets.

19 THE COURT: The ROSS portal?

20 MR. LASHWAY: The communications through the ROSS
21 portal --

22 THE COURT: Through the Ross portal.

23 MR. LASHWAY: -- which would include all the
24 metadata associated with the transfer of the data, right?

25 THE COURT: Uh-huh.

1 MR. LASHWAY: So that would be any logging or
2 anything else showing the transfer of data, and then
3 internal communications about the use of the work product
4 that LegalEase provided to ROSS. So what we have seen are
5 communications talking about dealings with LegalEase. What
6 we haven't seen is, say, a communication between Mr. Van Der
7 Heijden and the engineers as to where the source of the
8 questions are coming from, because that's something that
9 Ms. Whitehead at LegalEase was following up on repeatedly.

10 THE COURT: And do you think you don't have the
11 internal communications because there are internal e-mails
12 that are being withheld, or for what reason do you think
13 there are additional documents other than the Slack
14 documents?

15 MR. LASHWAY: Our best guess, Your Honor, is
16 twofold; one, they could be withheld because of the
17 assertion of privilege; but other than that, we think that
18 they haven't been identified because of the limitation on
19 the custodians and the limitation on the search terms. The
20 search terms that were proposed didn't yield the results
21 that we had all hoped for; and so here we are moving to
22 compel to say it didn't work. It's that simple. Let's go
23 back and revisit it.

24 THE COURT: Okay. I understand your point. Is
25 there --

1 MR. LASHWAY: I think that same category of
2 documents, Your Honor, would fall within Category 3.

3 THE COURT: Uh-huh.

4 MR. LASHWAY: And then with respect to Category 4,
5 we believe we have the agreements that is now the --
6 establishing the parties' contractual basis. What we don't
7 have are any drafts of the agreements. We were told by
8 Ms. Whitehead last week, who is the interface from
9 LegalEase's perspective, that she negotiated the terms of
10 the agreements along with their president, Tariq Hafeez. We
11 can't find the negotiations in drafts, and so we think that
12 that's important because we want to understand whether or
13 not the reliance on Westlaw was a critical part of the
14 project scope.

15 THE COURT: Okay.

16 MR. LASHWAY: So, Your Honor, that answers, I
17 think, your question as to the categories that we're
18 seeking.

19 THE COURT: And just for my clarification, is
20 there still a dispute over these LegalEase memoranda or is
21 that now resolved with the production of approximately
22 26,000?

23 MR. LASHWAY: Well, there's going to be -- there's
24 going to potentially be a -- let me rephrase. We're
25 confused as to why one party says, we sent over 27,000, and

1 the other party says, we only got over 26,000. There's
2 about 1,000 memos missing, and we're confused about that.
3 And we're going to depose ROSS, and so that's certainly
4 going to be a topic of testimony. We're also confused as to
5 frankly how the memos end up in a .json format that seems to
6 suggest there's more than 27,000 memos in our reading of
7 them.

8 THE COURT: Okay.

9 MR. LASHWAY: But we haven't finished that
10 exploration yet, Your Honor.

11 THE COURT: Uh-huh, all right.

12 MR. LASHWAY: And so certainly if there are
13 additional documents to be produced, we'd welcome them so
14 that the deposition is, you know, seven hours and we're done
15 and we can move to summary judgment.

16 Your Honor, as to the privilege -- and I'll keep
17 this one brief. I think it's relatively straightforward --
18 we're not challenging the assertion of attorney-client
19 privilege as it's applied in the district. What we are
20 challenging is the application of the privilege with respect
21 to Mr. Van Der Heijden's role. Our understanding, based on
22 the communications we have, and based on the testimony to
23 date, is that Mr. Van Der Heijden was the primary interface,
24 having replaced another gentleman named Tomas, between ROSS
25 and LegalEase; that he helped orchestrate the transmission

1 of this material. If he was also serving as a lawyer on
2 behalf of ROSS, that's news to us, but I'm not sure we're in
3 a position to actually have known that. I've looked --
4 we've looked at his social media, which we attached to our
5 moving papers, and it appears to us that he's not acting or
6 at least not representing himself as a lawyer. But looking
7 at the privilege log, Your Honor, and we point this out in
8 our reply brief, there is descriptions of the privilege to
9 us that are confusing, at best. So we point one out which
10 talks about the facilitation of legal advice; e-mail to
11 facilitate the rendition of legal advice to client regarding
12 ROSS's legal processes and status of matters. I don't know
13 what that is, and I have no way of assessing whether or not
14 that's truly privileged. I also don't have any way of
15 assessing whether Mr. Van Der Heijden actually was operating
16 as a lawyer on behalf of the company. Certainly there are
17 legal roles within companies, and Thomson Reuters and West
18 are certainly well aware of that. A lot of their employees
19 are licensed lawyers, they're just not practicing law on
20 behalf of the company. But we know that in order for the
21 attorney-client privilege to apply, there has to be a
22 specific request for legal advice or rendering of legal
23 advice, and it's not clear to us that that is what Mr. Van
24 Der Heijden was ever asked to do at ROSS. So we invite the
25 Court to either take a fulsome review, or to take a sampling

1 of the documents that have been withheld, and evaluate
2 whether or not there's truly a basis for Mr. Van Der Heijden
3 to be applying privilege as a Canadian attorney doing work
4 in San Francisco. I will share of the roughly 900 -- I'll
5 stop -- of their roughly 900 internal e-mails, we have
6 almost 400 that have been withheld on privilege.

7 THE COURT: So I have some questions. I'm trying
8 to understand if West is specifically objecting to the
9 assertion of privilege with respect to Mr. Van Der Heijden
10 because he is a Canadian lawyer, but not an American lawyer,
11 because that's a pretty complicated area of law. And I
12 didn't see that really flushed out in your brief. So what I
13 understand is you're saying, first of all, we think he was
14 operating in a business role, notwithstanding the fact that
15 he's a lawyer; correct?

16 MR. LASHWAY: Correct.

17 THE COURT: And then I understand you're saying
18 perhaps some of these communications, there's no reason to
19 think they were actually made in connection with a request
20 for legal advice or the provision of legal advice; right?

21 MR. LASHWAY: Correct.

22 THE COURT: And then there's been commentary about
23 his status as a Canadian lawyer. But it's not clear to me
24 if all of those other conditions were met, if it was a
25 provision of legal advice, or, you know, a response for

1 legal advice, if he was acting in a capacity as a lawyer,
2 rather than as a business person, would you still be
3 objecting to the assertion of privilege on the grounds that
4 he is a Canadian lawyer?

5 MR. LASHWAY: Your Honor, so we're taking a little
6 bit of a mixed approach there, quite honestly. So if the
7 company is taking the position that Mr. Van Der Heijden, as
8 he's sitting in California -- and he's going to represent
9 that he did all of his work in Toronto, and we'll represent
10 back that LegalEase met with Mr. Van Der Heijden, we
11 believe, in San Francisco, and that they understood that he
12 worked out of San Francisco at times. We're not inviting
13 the Court to go through a complicated cross-border analysis
14 in the application of legal privilege. What we are saying
15 is that if he was operating as a lawyer, if he was appointed
16 to provide legal counsel to the company, then if he's
17 traveling to the United States, we're going to assume that
18 that privilege would attach, Your Honor. But we also
19 believe that that's further evidence of the fact that he was
20 not operating as a lawyer on behalf of the company.

21 THE COURT: Okay.

22 MR. LASHWAY: Now, to be crystal clear, when
23 Dorsey & Whitney is retained and there's an assertion of
24 work product that follows Mr. Lancaster, we're not
25 challenging that. That's clear as day that they were doing

1 work to help ROSS in connection with the litigation that we
2 brought.

3 THE COURT: All right. And how many of the
4 documents that are on the privilege logs that involve
5 Mr. Van Der Heijden are interROSS communications, I guess,
6 for lack of a -- introROSS communications rather than
7 Mr. Van Der Heijden communicating with Mr. Lancaster?

8 MR. LASHWAY: I think it's a significant percent,
9 Your Honor. I haven't done that count.

10 THE COURT: Uh-huh.

11 MR. LASHWAY: I can do it while Mr. Lancaster is
12 arguing, if you'd like, but I think it's a relatively high
13 amount.

14 THE COURT: Okay.

15 MR. LASHWAY: Yeah.

16 THE COURT: All right. And when did -- when did
17 you first meet and confer with ROSS about their privilege
18 log and the concerns that you have?

19 MR. LASHWAY: So that was in September,
20 Your Honor, soon after receiving the privilege log from
21 Mr. Lancaster and his partner, and we raised concerns about
22 the assertion of privilege with respect to Mr. Van Der
23 Heijden. We were obviously very surprised by this, given
24 the representations I have made to the Court. We asked them
25 to revisit it, and the answer was he was acting in the

1 capacity of a lawyer. As a company, we're going to stand by
2 our privilege assertions.

3 THE COURT: Okay. And with respect to the -- so
4 there's sort of that global issue, and then there's also
5 your concerns about the descriptions. Did you also meet and
6 confer about the descriptions at the time?

7 MR. LASHWAY: Well, we've raised the idea that we
8 can't sort out whether he was providing legal advice or not
9 given the status of the privilege log, yes, Your Honor.

10 THE COURT: So you raised the concerns about the
11 descriptions?

12 MR. LASHWAY: We raised concerns about the
13 privilege log globally and the assertion of privilege by
14 Mr. Van Der Heijden, yes.

15 THE COURT: Okay. And the response, in your view,
16 was that ROSS was refusing to reconsider, revise or
17 supplement its log?

18 MR. LASHWAY: Well, I would maybe characterize it
19 differently in my memory, Your Honor. My memory is that
20 they asserted that they believed that the privilege log was
21 sufficient for purposes of establishing privilege.

22 THE COURT: Okay.

23 MR. LASHWAY: And, Your Honor, I will share that
24 that was soon before we filed the motion to compel, so that
25 was a -- I think one phone call that we had.

1 THE COURT: Have you had any follow-up discussions
2 with ROSS since you filed your motion to compel? Have any
3 of these issues moved forward since you filed your reply
4 brief?

5 MR. LASHWAY: Our follow-up discussions,
6 Your Honor, have been with respect to our filing of a
7 document that has now been clawed back. ROSS's counsel took
8 issue with us filing a document that, in our view, was very
9 purposefully redacted and very purposefully unredacted.
10 That document has been clawed back pursuant to the
11 confidentiality order. We completely disagreed with their
12 positions as to application of privilege. We address this
13 in our reply. But we've removed the document, pursuant to
14 the Court's confidentiality order, from our possession. I
15 don't know if it's still sitting in the Court's docket, but
16 it is filed under seal as we filed it, and so we had a
17 conversation with Mr. Lancaster's partner about that issue.

18 THE COURT: Okay. And I have a couple of
19 questions about the Slack messages.

20 MR. LASHWAY: Yeah.

21 THE COURT: I don't know if you've got anything
22 more to say about those or --

23 MR. LASHWAY: Not about the privilege, Your Honor,
24 no.

25 THE COURT: Oh, okay. All right.

1 So with respect to the Slack messages, you know, I
2 have read the correspondence and I see there was discussion
3 about West covering the costs. And my sense is that West
4 is -- seems somewhat amenable to covering some of the costs
5 of the Slack production, or am I missing something?

6 MR. LASHWAY: No, you are correct, Your Honor.

7 THE COURT: Okay.

8 MR. LASHWAY: What I haven't been able to do,
9 because I haven't been able to engage with my client
10 effectively on it, is what those costs would be. And
11 they're not willing to pay for all of them, so the offer was
12 to pay for the costs, not the fees associated with Dorsey &
13 Whitney's review of the Slack communications.

14 THE COURT: And at this point in time, we have
15 declarations where we know that the cost of the collection
16 apparently was \$3,000, roughly, and then ROSS is estimating
17 the loading, review, redaction log and production costs of
18 about \$10,000. So we have a pretty defined world here,
19 and --

20 MR. LASHWAY: Right.

21 THE COURT: -- in view of ESI, it doesn't seem
22 like that big of a world. And assuming -- I mean, I know
23 that ROSS can't perfectly predict what the costs would be,
24 but I'm wondering now if West is able to commit to some --
25 to some share of those costs since it sounds like you're

1 willing to -- you're willing to contribute to those costs.
2 We know it's going to be roughly under \$15,000. So is this
3 issue truly not resolvable at this point such that I need to
4 decide it?

5 MR. LASHWAY: Well, Your Honor, I think there's a
6 nuance here that's important. I don't think West is
7 offering to pay for the review of the Slack communications.
8 That's -- that's not necessarily required by the federal
9 rules. They can produce the documents using search terms or
10 something else that we could agree upon and produce them. I
11 don't see why West would be offering to pay for ROSS's
12 counsel's review for the application of privilege or
13 confidentiality treatment under the order.

14 THE COURT: Is that the only part of the costs
15 that West would object to?

16 MR. LASHWAY: I think the -- if there's a cost
17 certain that -- with respect to the technical collection and
18 processing for my client to consider, then we absolutely
19 would respond, but that's not what's been offered to us.

20 THE COURT: All right. Well, I think if ROSS
21 could provide you with an estimate for loading, redaction --
22 well, I suppose -- it sounds like you object to redaction
23 and logging -- but loading and production costs, I mean,
24 they can't give you a cost certain. No one ever knows
25 exactly what ESI is going to cost until you're finished with

1 it. They can give you an estimate from their vendor.

2 MR. LASHWAY: Right. But this is the internal
3 vendor at Dorsey & Whitney, Your Honor, as I understand it.
4 I mean, or the vendor we use can say this is what it's going
5 to cost. It's going to cost between 3 and \$5,000.

6 THE COURT: And that's what we have.

7 MR. LASHWAY: Well, what we have is \$3,000 plus
8 another 10,000 for it to be reviewed, et cetera. To me,
9 there's still no, you know, here's the invoice and we're
10 willing to take half of it and we'll split the costs with
11 you.

12 THE COURT: What if they provided you with the
13 estimate from the vendor?

14 MR. LASHWAY: Yeah, absolutely.

15 THE COURT: Okay.

16 MR. LASHWAY: Perfect resolution.

17 THE COURT: I mean, this -- it's going to be an
18 estimate. It's not going to be an invoice because nobody
19 knows what it will cost until after it's been done, so...

20 MR. LASHWAY: Right. And if the estimate doubles
21 in amount, then we'll be back in front of the Court of
22 course, right? I mean, Your Honor, this is now science, as
23 you know full well having practiced. There's estimates, but
24 it's also relatively straightforward. The idea that Slack
25 communications present an unknown challenge, to me, is a

1 little bit of a complicated thing to digest. There's some
2 discrete amount of Slack communications available for
3 collection. There's going to be a cost associated with that
4 that we should be able to identify, and then there's going
5 to be a cost associated with the actual production of the
6 documents, running of search terms we can agree upon, and
7 then the production on some unknown amount, right? The
8 first cost and the second cost should be relatively
9 determinable at this point since we've been talking about
10 this since July in our view. And I also say only recently
11 did we get the quote for \$3,000. Before it was \$9,000 plus
12 some, and apparently they've now incurred the \$3,000 cost
13 after I think we've moved here.

14 THE COURT: And if you can articulate for me why
15 West thinks the Slack messages are so important.

16 MR. LASHWAY: Your Honor, so it's clear to us that
17 there was some form of communication being used about a
18 two-plus-year project in which there are literally thousands
19 of communications with LegalEase, yet only 900 produced by
20 ROSS, there was some other form of communication. ROSS
21 hasn't -- to be clear, hasn't challenged the relevance of
22 the Slack communications. They've only challenged the
23 burden, the cost associated with producing them.

24 THE COURT: Certainly. But importance of the
25 discovery is a factor in my analysis, so I'm trying to

1 understand -- if you can just articulate for me why you
2 think the Slack messages are important.

3 MR. LASHWAY: So as I mentioned before, one of the
4 core categories we're missing from ROSS's production are the
5 internal communications about the use of these legal
6 research memos that, quote, unquote, LegalEase produced to
7 ROSS. We think we have a right to understand if they were
8 used, how they were used, and what ROSS knew about them for
9 purposes of our injunctive relief. And it is clear to us,
10 based on the production -- collection and production to
11 date, that we are missing internal communications. We're
12 aware that Slack was used. ROSS has made representations as
13 to the volume of Slack communications, which suggests that
14 it was used frequently for a relatively -- for a company
15 with a relatively small amount of employees. And we have an
16 understanding, based on ROSS's representations to us, that
17 there are relevant documents and relevant communications in
18 those Slack communications.

19 THE COURT: Okay.

20 MR. LASHWAY: That pool that we're talking about.

21 THE COURT: Okay. One other question, is there
22 any dispute as to the production of the external emails from
23 ROSS at this time, setting aside Morae, Clutch, and Kelly?

24 MR. LASHWAY: So, Your Honor, no. We understood
25 that they had searched for all communications with

1 LegalEase.

2 THE COURT: Uh-huh.

3 MR. LASHWAY: And those would be the ones that
4 would have come up. What we're not able to opine on, and
5 we're going to take representations at face value, is that
6 only those nine custodians were involved. We don't have
7 other custodians to identify for you --

8 THE COURT: Okay.

9 MR. LASHWAY: -- other than the Google Sheet and
10 the Box and those forms of communication.

11 THE COURT: All right.

12 MR. LASHWAY: And, Your Honor, obviously we have a
13 significant disagreement as to the requests for
14 cost-shifting. The costs incurred to date, in our view,
15 were things that ROSS committed to produce, and likely in
16 responding to our moving papers, which, in our view, ROSS
17 accepted knowingly and fully. And we don't know, frankly,
18 and it's not articulated, how much of those costs are
19 associated with the actual production, how much of those
20 costs are associated with figuring out whether ROSS could be
21 potentially a party to the case. I have no idea what the
22 counseling was involved in that.

23 THE COURT: Okay.

24 MR. LASHWAY: I can go into further detail on
25 that, but most of it is set forth --

1 THE COURT: No. I don't have any additional
2 questions in that regard.

3 MR. LASHWAY: Thank you, Your Honor.

4 THE COURT: Okay. Thank you.

5 Mr. Lancaster.

6 MR. LANCASTER: Sure. And I -- I don't know what
7 position LegalEase is going to take.

8 MS. CEFALU: LegalEase, in part, we defer to our
9 client, ROSS, as to the burdens. A lot of the arguments, I
10 think it would make more sense if they respond first.

11 THE COURT: I thought it made sense for
12 Mr. Lancaster to go first on behalf of ROSS and then hear
13 from LegalEase, but if -- is that agreeable to everyone? It
14 seems to make sense to me.

15 MR. LANCASTER: Certainly to us.

16 MS. CEFALU: Certainly.

17 THE COURT: All right. Thank you.

18 MR. LANCASTER: Thank you, Your Honor. This is
19 one of the most unusual discovery arguments I have ever
20 participated in in that I don't know how the Court resolves
21 these conflicting things that the parties are saying about
22 what's been produced and when it was produced. We, as the
23 Court noted, have submitted a declaration making various
24 statements. We believe that everything has been produced
25 apart from the Slack messages, but let me say a couple

1 preliminary things. I think this probably goes without
2 saying, I've talked on the phone to Ms. Cefalu probably a
3 couple times. She's been more responsive to us than anyone
4 else at LegalEase. I have a lot of sympathy with West's
5 frustration with LegalEase. We are certainly not here to
6 defend them. All I can say is that with the exception of
7 Ms. Cefalu returning my calls, but not in a position to
8 answer substantive questions, LegalEase treats us the same
9 way that it treats Westlaw, and we -- West, and we regard
10 ourselves as a victim of LegalEase, just as Westlaw is.

11 One other point, Your Honor, about the role of
12 LegalEase. The brief, as you notice, is full of complaints
13 about LegalEase, which we have no argument with, but I do
14 think that it's worth keeping in mind that ROSS is not a
15 party to the case, and, in particular, what that means is
16 West is entitled to find out everything that LegalEase did
17 with West's information, and, as I -- if I am hearing
18 counsel correctly, there is no longer any argument about any
19 production as between ROSS and LegalEase.

20 With respect to the claims in the case, what
21 LegalEase did with West's information, that's not a ROSS
22 issue. And all that's left that we're talking about are
23 these Slack messages which are obviously internal messages.
24 We don't see how those are relevant to the case at all, and
25 that's one reason why we have resisted. Now, we have

1 produced lots of e-mails, internal e-mails. We think that
2 even that goes beyond what's relevant to the case.

3 Now, some of the points that I'd be inclined to
4 make Your Honor has already made, but there are a number of
5 things that counsel said that -- that we do disagree with as
6 a factual matter as you might expect. I'll speak first to
7 the role of Mr. Van Der Heijden. And if something that
8 comes out of this is a certification or there is going to be
9 a deposition, which is going to be a very expensive event,
10 West can ask him questions to their heart's content. But he
11 does obviously have both a dual business and legal role.
12 We've carefully distinguished between those. Obviously no
13 communication that Mr. Van Der Heijden had with LegalEase
14 could possibly be privileged, and we have never claimed
15 that. We're just talking about a portion of the internal
16 documents.

17 THE COURT: You mentioned the certification, and I
18 know in West's reply, they stated several times that they
19 would be satisfied with -- setting aside the Slack and maybe
20 these portal and Google issues, satisfied with a
21 certification. Is that something that ROSS is willing to
22 agree to?

23 MR. LANCASTER: Absolutely. And we can do that in
24 writing before a deposition. We could -- and it can be
25 subject to cross-examination during a deposition.

1 THE COURT: Okay.

2 MR. LANCASTER: As to the fees that we've
3 incurred, both going back and going forward, this became an
4 incremental process where we kind of step-by-step, as the
5 fees mounted, the problem became more and more significant.
6 And the client has been charged \$80,000. That figure is not
7 made up. About 20,000 of that is the costs, the inhouse
8 contract processing. And those are costs just like, you
9 know, any other vendor costs, even though it's an inhouse
10 Dorsey set of contract reviewers. Obviously when you're
11 producing documents, internal documents, you have to review
12 for privilege. And how those should be excluded from the
13 burden that a third party should not have to bear in
14 connection with a subpoena, we frankly don't understand.
15 That's a cost of complying with the subpoena, just like all
16 these other costs are.

17 We cited to the Court a number of cases where even
18 an entity like U.S. Bank, when it incurred just \$5,000 in
19 costs was entitled to be reimbursed. We cited a case where
20 figures as low as \$500 were entitled to be reimbursed.
21 These are all real-world expenses, Your Honor.

22 THE COURT: With respect to the cost issue, I have
23 seen in the correspondence that you repeatedly brought up
24 the question of costs with respect to Slack with West
25 Publishing, but I'm not finding anything in the record where

1 ROSS would have put West on notice that they were seeking to
2 shift costs for anything other than Slack. Can you point me
3 to something in the record?

4 MR. LANCASTER: No. That's fair, Your Honor.

5 THE COURT: Okay.

6 MR. LANCASTER: We raised that in the briefing.

7 I won't repeat the points that the Court made
8 about the timing of these various notifications. One small
9 issue is -- and another example of the parties just talking
10 past each other in the briefing, we did produce all these
11 memos in the .json format long ago, a month before they got
12 reproduced in Word format. And in its papers, West
13 continues to insist that that production didn't occur, and
14 it had to file a motion or threaten to file a motion in
15 order to get them. But today was the first time that I have
16 heard an acknowledgment that, yes, they can review the .json
17 files. Always before it was as if they did not exist.

18 Why don't I run through the four categories of
19 documents if that seems useful to the Court.

20 THE COURT: Certainly.

21 MR. LANCASTER: So the first category, so the
22 parties disagree about the history of this Morae and the
23 others. So searching electronically does not remove the
24 application of human knowledge and some common sense, and so
25 we canvassed the people within ROSS who could have had some

1 communications with any of these entities, and they
2 indicated to us, no. We then followed up, when West raised
3 questions about that, with a second search -- I shouldn't
4 say a second search -- a first search that confirmed what we
5 initially concluded. And then when West complained some
6 more as if we had not said that, we conducted yet now a
7 second search, following first the application of human
8 knowledge and then two rounds of searches. And they have
9 all been consistent.

10 THE COURT: What's the difference between the
11 first and second round?

12 MR. LANCASTER: Nothing. Just confirmation.

13 THE COURT: So in both times, I think Ms. Johnson,
14 is that who it was?

15 MR. LANCASTER: Right.

16 THE COURT: She had performed a search for those
17 terms on the collections of the nine identified custodians;
18 is that right?

19 MR. LANCASTER: Correct.

20 THE COURT: Okay.

21 MR. LANCASTER: Correct. But -- yeah. That is
22 correct. And so I think that's a dead issue.

23 In terms of LegalEase providing Westlaw
24 information to ROSS, if ROSS were inclined to hide
25 something, it would not have produced the actual Westlaw

1 information that was provided by LegalEase to ROSS. And I
2 think the Court has heard before that LegalEase did not
3 produce that information. And, again, that would be the
4 No. 1 thing that we'd be interested in hiding if that's the
5 way we were going about this. I don't think that that's an
6 issue. It was done back on August 14th, long before this
7 motion got filed.

8 All documents -- I'm paraphrasing of course -- all
9 documents relating to the ROSS relationship with LegalEase.
10 External, I don't think there's any remaining question about
11 that. We used these search terms that we have had the
12 discussion about timing on for the internal communications.
13 We have not produced any Slack communications, which, for
14 the reasons I've stated, don't seem relevant to West's
15 claims against LegalEase.

16 THE COURT: Can you address the Google Sheets, the
17 portal and Box?

18 MR. LANCASTER: Yeah.

19 THE COURT: Okay.

20 MR. LANCASTER: The information within the Google
21 Sheets is contained within the questions that are part of
22 these question/answer memos. So that information has all
23 been produced in that form, and I know that you just heard
24 the contrary from West, but that's something that we have
25 represented through a declaration and are glad to certify

1 again.

2 And then, finally, all documents relating to the
3 ROSS agreements with LegalEase. Again, not a question of
4 any external documents. We applied the search terms for the
5 internal documents.

6 THE COURT: All right. Can you go back to Box and
7 the portal and so on as well? There was the ROSS portal
8 that West has raised, and then also they seem to think files
9 were exchanged on the Box system as well.

10 MR. LANCASTER: You know, I -- I actually don't
11 know what they are referring to there, and if -- I can,
12 after I sit down, confer with my client to see whether he
13 knows, but I -- so far as I know, all the information that
14 ROSS would have provided to LegalEase is contained within
15 the memos --

16 THE COURT: The memos and --

17 MR. LANCASTER: -- by whatever portal they were
18 exchanged.

19 THE COURT: Which you think was the Google Sheets?

20 MR. LANCASTER: Right.

21 THE COURT: Okay.

22 MR. LANCASTER: Right.

23 I would say as to Slack, that West cites no case
24 in which production of such messages was ordered. We're not
25 aware of any such case either because of this awesome

1 complexity of going through those documents.

2 THE COURT: With respect to the search terms --

3 MR. LANCASTER: Yes.

4 THE COURT: -- you, I believe, did say in your
5 introduction that ROSS was willing to perhaps produce more
6 documents. So is ROSS willing to engage in a discussion
7 with West about these additional terms that they would like
8 to propose?

9 MR. LANCASTER: We are, Your Honor, but at this
10 point thousands upon thousands of documents have been
11 produced. I do think West surely has enough information to
12 decide what additional search terms it wants. So -- so but
13 are we willing to have a conversation about that? We ran
14 into a roadblock because, okay, we made a proposal. Could
15 you respond to our proposal? And that's been going on for
16 months.

17 THE COURT: Go ahead.

18 MR. LANCASTER: That's all I've got to say,
19 Your Honor, subject to further questions from the Court.

20 THE COURT: All right. I did -- I think I did
21 have one question about your search terms and that's why I
22 was sort of thinking up here for a minute. I wanted to know
23 how many of the 4,000 documents that hit on Westlaw were
24 duplicates of the documents that you've already produced?

25 MR. LANCASTER: 100 percent so far as we know. We

1 don't think that Westlaw -- and our initial reaction was it
2 generates so many irrelevant items, but this is another one
3 of those things where, when challenged, we went back and did
4 run a search, and everything that contained Westlaw also
5 contained another search term, so we believe that category
6 is null.

7 THE COURT: And you, I assume, would be able to
8 run some kind of report that would show that?

9 MR. LANCASTER: I would assume so, yes,
10 Your Honor.

11 THE COURT: Okay. All right.

12 Turning to the privilege log --

13 MR. LANCASTER: Yes.

14 THE COURT: -- I have a -- I have a question, and
15 perhaps this is just a question of people having very
16 similar names, but I notice that it seems like Kurt
17 Niederluecke is listed as an attorney on ROSS's privilege
18 log, and doesn't he work at Fredrikson?

19 MS. FRIEDEMANN: Indeed he does.

20 THE COURT: So I'm wondering why -- and I can
21 direct you to this, Mr. Lancaster, if you have the record up
22 in front of you, but I'm just a little bit -- perhaps
23 there's a Kurt Niederluecke at ROSS Intelligence and there
24 are two of them in the world. But on page 5 of 16 of docket
25 65-5, there are communications between Mr. Van Der Heijden

1 and Kurt Niederluecke, email chain seeking legal advice
2 regarding West versus LegalEase.

3 MR. LANCASTER: Well, it probably goes without
4 saying there were no such communications between Mr. Van Der
5 Heijden --

6 THE COURT: Or I think there would be a conflict
7 issue.

8 MR. LANCASTER: Yes.

9 THE COURT: So what that suggests to me is the
10 privilege log does need to be reviewed. This is -- I mean,
11 I'll be issuing an order -- an order eventually, but when I
12 look at something like that, I think there are three entries
13 where Kurt Niederluecke is listed. And, again, maybe
14 there's a Kurt Niederluecke at LegalEase, and we'll just all
15 find that out, but I note this is on page --

16 MR. LANCASTER: No, I'm confident --

17 THE COURT: Yeah. Okay.

18 MR. LANCASTER: -- there is not, and I never had
19 any communications with him either, which is the only way
20 that any communication with Fredrikson could have come to
21 the company, so that remains a mystery.

22 THE COURT: Perhaps I'll just -- Ms. Friedemann,
23 are you able to shed any light on this at this time?

24 MS. FRIEDEMANN: Not with confidence, Your Honor,
25 although I do recall that perhaps ROSS reached out to

1 Mr. Niederluecke, and then we said, no, we have a conflict
2 and we are unable to assist.

3 THE COURT: You have a conflict? I see, okay. So
4 perhaps there is a reason for it --

5 MR. LANCASTER: Okay.

6 THE COURT: -- but it caught my eye.

7 MR. LANCASTER: That's news to me.

8 THE COURT: Sure. And Dorsey is a fine firm as
9 well, so -- so I just -- it caught my eye, and it made me a
10 little bit concerned about a privilege log and the review
11 process just in general because it seemed unusual. Perhaps
12 there is a rationale for that, in which case I apologize
13 and -- I guess I don't know if I need to apologize it caught
14 my eye, but I'm fine with the entries being there, but if
15 you could take a look at that.

16 MR. LANCASTER: Sure.

17 THE COURT: Yeah. Okay. Thank you.

18 MR. LANCASTER: All right. Thank you, Your Honor.

19 THE COURT: All right. Thank you.

20 Ms. Cefalu?

21 MS. CEFALU: Thank you, Your Honor. Your Honor,
22 LegalEase's position is simply that this is a Rule 45
23 subpoena, and obviously the -- whether or not the burden on
24 ROSS -- my client's, you know, former client -- is
25 unreasonable has to be viewed through the prism of the

1 claims at issue, No. 1. As Mr. Lancaster pointed out,
2 they're not a party to this, and, to date, they have
3 produced -- I think that they've acted very reasonably.
4 They've produced 900 e-mails. They've searched nine
5 different custodians. They have produced the substantive,
6 you know, information that we have exchanged or thousands of
7 documents demonstrating what type of information was
8 exchanged between LegalEase and ROSS. So our position, it
9 just seems to be that a number of things that West brings up
10 is that, well, the documents that we think you might have
11 were not produced, therefore, we don't think you produced
12 them, and that's not a valid objection to a subpoena.

13 We believe that -- we basically support ROSS's
14 position; and as to a number of the communications, for
15 example, the Google Sheet, we don't have access to it. We
16 have to rely on their representations about what's in there,
17 and they're willing to certify that the information has
18 already been produced. I think that that's reasonable. I
19 also think the fact that they're not objecting to having a
20 deposition, they can be asked questions about that, and that
21 is a way of working around whether or not there's some grand
22 conspiracy. I mean, I understand as a litigator people
23 serve subpoenas to try to verify whether or not there are
24 additional things out there, but you have to do it within
25 reason, and our position is that the claims at issue only

1 justify what has already been produced. And as to whatever
2 else they're willing to work with Westlaw on, we are fine
3 with that, but we don't think that the claims at issue give
4 them the right to sort of harass and oppress one of our
5 clients, and so I think anything more than whatever ROSS is
6 willing to provide would be unreasonable.

7 THE COURT: All right. Thank you.

8 MS. CEFALU: Thank you.

9 THE COURT: Mr. Lashway.

10 MR. LASHWAY: May I be heard just briefly? Thank
11 you.

12 THE COURT: Uh-huh.

13 MR. LASHWAY: Your Honor, may I have the Court's
14 permission to hand up just three documents that have been
15 produced by ROSS in the case that help answer some of the
16 questions that have been raised by both?

17 THE COURT: Do they have copies?

18 MR. LASHWAY: I will hand them copies now,
19 Your Honor.

20 THE COURT: Yes, you can give them to my clerk
21 here, Sam.

22 MR. LASHWAY: So, Your Honor, just very briefly,
23 we've handed you three documents that have been produced by
24 ROSS in this case in response to our subpoena, for which we
25 appreciate that. We have not found copies of these

1 documents in LegalEase's production. For the record, they
2 may be there, but we haven't found them. The first one,
3 Your Honor, addresses the points raised by Mr. Lancaster as
4 to the Google Sheets. While the questions or the data may
5 exist in the .json files that have hundreds of thousands of
6 lines and indecipherable to us as to what they are, this
7 e-mail makes clear to us that ROSS was using a Google Sheet
8 to pose questions for LegalEase -- that Google Sheets called
9 questions for LegalEase. Testimony has shown, thus far,
10 that LegalEase explored where those questions were coming
11 from. It couldn't. At some point in time, LegalEase
12 started posing questions to ROSS that were part of the
13 disclosures I made earlier were taken from headnotes in
14 Westlaw cases using the key number system. Material that we
15 believe is protected and certainly would be in violation of
16 LegalEase's contractual rights.

17 The second document, Your Honor, which is called
18 the new ROSS memo system, gives you one explanation of one
19 of the portals that ROSS used to transmit and -- to transmit
20 Westlaw data and to communicate with LegalEase as to the
21 transmission. We don't have any production of information
22 from either LegalEase or ROSS as to this ROSS automated memo
23 system that was shared between the two companies. We
24 also -- just to be clear, we also don't have the video, and
25 there's other videos that are on YouTube that are password

1 protected that LegalEase believes they don't have access to
2 that were prepared by ROSS, we're told. We don't have any
3 of those. And our understanding is that those videos may
4 very well show how the memos were to be prepared using
5 Westlaw data and how they were to be transmitted and maybe
6 even how they were to be used by ROSS. We don't know.

7 The third, Your Honor, is a letter from
8 Mr. Lancaster to counsel for LegalEase which may explain why
9 Ms. Cefalu is arguing on behalf of ROSS and its client. Our
10 understanding is that ROSS has concerns, not only about its
11 productions in this case, but also about the production of
12 material that could be used purportedly by LegalEase to
13 reverse engineer their technology. I know this because
14 Mr. Lancaster has made those assertions to me in one of our
15 very first phone calls. That's exactly why there's a
16 confidentiality order in place, Your Honor. It's two-tier.
17 We had anticipated, when we had arguments in front of the
18 Court on this topic, that there was going to be proprietary
19 information shared by the parties to the case and the third
20 parties. And if that's a hindrance to the production of
21 material, that confidentiality order solves for that.

22 With respect to the memos, Your Honor, just to be
23 very clear as to the record --

24 THE COURT: Just let me ask you, are you
25 suggesting that ROSS is withholding documents based on

1 confidentiality concerns?

2 MR. LASHWAY: I don't know, Your Honor, but I do
3 know that I don't have all of the memos, and so no one can
4 explain to me where the 1,000 memos are. And if you look at
5 the correspondence that I won't recite for you again, it is
6 clear that even during the collection process, we, counsel
7 for West, had to educate ROSS's counsel as to the fact that
8 there were 27,000 memos in Word that their supposed
9 collection failed to identify. That's a very significant
10 percentage of their overall production in this case. And we
11 only know that from our motion practice with LegalEase.

12 As for deposition testimony, Your Honor, I
13 certainly hope that ROSS's witnesses have a better
14 recollection as to a two-plus-year-long project than
15 LegalEase's. But Ms. Whitehead who testified last week,
16 Ms. Cefalu's client, was fired two days before her
17 testimony. Not clear if she's going to be rehired. We
18 found that quite remarkable. The CEO of LegalEase attended
19 the deposition, along with their counsel, which they
20 asserted objections during testimony, even though they
21 weren't representing the witness, and she failed to remember
22 nothing. She did remember Mr. Van Der Heijden and said he
23 always wears scarves when they meet, but, yet, she claimed
24 that they only met once or twice. She couldn't remember.
25 So there seems to be a problem for us in just getting to the

1 documents and getting to the material so we can move this
2 case along.

3 THE COURT: All right. Thank you.

4 MR. LASHWAY: Thank you, Your Honor.

5 THE COURT: Mr. Lancaster, is there anything you'd
6 like to add?

7 MR. LANCASTER: Well, I really -- just one point,
8 and I'm repeating myself, but this issue about being
9 educated on the documents that were produced, it's the same
10 issue we've talked about a number of times, the production
11 of the .json files, which, in West's view, never happened.
12 They were applied -- supplied, and we didn't find out until
13 later that West couldn't figure out how to read them, so it
14 may well be academic at this point, but --

15 THE COURT: Let me ask you a question. Is ROSS
16 withholding any documents based on confidentiality concerns?

17 MR. LANCASTER: No.

18 THE COURT: All right. Okay. Thank you.

19 Well, I'm going to take the matter under
20 advisement and we will try to get -- I'll try to get an
21 order out as soon as possible. In the meantime, I'll just
22 have -- make a couple of observations from the bench. If
23 West has suggestions or proposed search terms that they
24 think that ROSS should be running, I think that they should
25 convey those and have a discussion about them. I'm not

1 finding at this time that ROSS has an obligation to run
2 them, but I see no reason why that conversation should wait
3 for me to issue an order. And I do think that, in view of
4 the fact that -- that ROSS has disclosed their search terms,
5 and West has now had the opportunity to go through their
6 production and take some depositions, I do think West is --
7 sounds like they have some search terms in mind, so go ahead
8 and talk about them with ROSS sooner rather than later just
9 so we can keep the case moving.

10 Also, if ROSS is able to provide an estimate with
11 respect to the Slack costs, Mr. Lancaster, I know that you
12 provided some type of estimate perhaps in an e-mail or a
13 declaration, but if it's a question of sending over a
14 document that breaks down those costs and you are willing to
15 do it, it seems like that might move things forward. I will
16 take the motion under advisement and issue a ruling, but to
17 the extent the parties are able to work through some of
18 these issues and get them resolved in advance, you know,
19 that's always appreciated. And you can let me know if that
20 happens, otherwise, I will decide the entirety of the
21 motion.

22 Anything further from West?

23 MR. LASHWAY: Your Honor, the only thing is the
24 case schedule, so we've been pushing this out to accommodate
25 the scheduling of depositions. As of right now, I believe

1 we have to complete depositions by next Friday, the 25th of
2 October.

3 MS. CEFALU: That is correct.

4 MR. LASHWAY: We have -- are working to schedule
5 two third-party depositions. They likely will be done by
6 phone to accommodate locations and to try to address some
7 efficiencies and then, of course, there's the ROSS
8 deposition that we would like to proceed only after these
9 discovery issues are resolved.

10 THE COURT: So if you want to file a proposed
11 amendment to the scheduling order, I will consider it and
12 take a look at it in view of your diligence. And I think
13 you're all familiar with what's required under the local
14 rules when you seek an extension and the information that
15 has to be included, so I will, of course, take a look at
16 that if you seek an extension.

17 MR. LASHWAY: Okay. We'll work with Ms. Cefalu to
18 prepare something for the Court.

19 THE COURT: I will say in view of the schedule, I
20 know we've had a couple of extensions so far. That is
21 another reason why everyone should be talking to try to get
22 these issues resolved, and, you know, trying to collaborate
23 and cooperate on those issues.

24 So all right, Mr. Lancaster, anything further from
25 ROSS?

1 MR. LANCASTER: (Shakes head.)

2 THE COURT: All right. Thank you.

3 Ms. Cefalu?

4 MS. CEFALU: No. Thank you, Your Honor.

5 THE COURT: Thank you all for your arguments and
6 have a good rest of the day. We're in recess.

7 THE LAW CLERK: All rise.

8 (Court adjourned at 11:09 a.m.)

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12 I, Erin D. Drost, certify that the foregoing is a
13 correct transcript from the record of proceedings in the
14 above-entitled matter.

15

16 Certified by: s/ Erin D. Drost

17 Erin D. Drost, RMR-CRR

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